



BUDGET COMMITTEE



Judd Gregg, Ranking Member
<http://budget.senate.gov/republican>

Contact: Betsy Holahan (202)224-6011

For Immediate Release

March 18, 2010

**Colloquy of Senators Gregg, Cornyn and Thune
on the Byrd Rule and the High-Cost Plans Tax
March 18, 2010
Prepared Text**

Senator Gregg: Mr. President, I rise to discuss an issue of great importance to all Americans. Much press coverage has focused on a parliamentary maneuver that is used from time to time here in the Senate, known as “reconciliation.” Now, this is a confusing issue that raises a whole host of complications, so it is important that we fully discuss this issue and the problems it can raise on the floor before we are forced to consider a reconciliation bill. It seems from press reports that Democrats in this body are determined to pass a health care bill through this reconciliation process.

Senator Thune: If I may, does the Senator realize that both the House and Senate have already passed health care bills?

Senator Gregg: I was aware of that fact – just this December, the Senate passed a bill that raised half a trillion in taxes, cut half a trillion in Medicare, and expanded entitlements at a time when the United States can’t afford the entitlements we have already promised.

Senator Thune: So if I may ask my colleague, why would the majority need to pass another health care bill using reconciliation?

Senator Cornyn: I think I can explain – apparently the House of Representatives is unable to agree on portions of the health care bill that passed the Senate, so they are attempting to pass a separate reconciliation bill that would change portions of the Senate bill they disagree with once they’ve passed the Senate bill.

Senator Gregg: That’s exactly right. Their plan seems to be to pass the Senate bill, which they don’t agree with, and change it to their liking in a separate reconciliation bill that they will pass concurrently with the Senate bill. The Senate could then take up the reconciliation bill under the expedited procedures afforded such bills, avoiding the need to find 60 Senators who agree with the policy and pass the modifications with only 50 votes.

Senator Thune: That is quite a scheme. But reconciliation introduces a whole host of complications into passing legislation here in the Senate, isn't that true?

Senator Cornyn: It is true. One of those complications is found in section 313 of the Congressional Budget Act, something that we refer to around here as the "Byrd Rule," named after its original sponsor, the distinguished Senator from West Virginia.

Senator Gregg: Would my colleague mind explaining this rule to those present in the Chamber who may not be familiar with it?

Senator Cornyn: Of course – what the Byrd rule does is it places restrictions on legislation that is considered through the reconciliation process. One of those provisions generally prevents the Senate from considering reconciliation bills that contain "extraneous matter" not related to deficit reduction. What qualifies as "extraneous" for purposes of the Byrd rule can be somewhat subjective, and is subject to the ruling of the chair, who relies on past precedent and previous rulings to determine the application of the rule to new legislation. There are six tests of "extraneous" matters in the Byrd rule, and one of them, found in Section 313(b)(1)(f), is anything that violates Section 310(g) of the Congressional Budget Act, which I happen to have in front of me. Section 310(g) prevents consideration of any legislation that "contains recommendations with respect to the old-age, survivors, and disability insurance programs established under title II of the Social Security Act."

Senator Gregg: That's correct. If a reconciliation bill does include changes to Social Security, under the Congressional Budget Act there is a point of order that can be raised that would require a 60-vote threshold to waive.

Senator Thune: And what happens if that point of order is not waived?

Senator Cornyn: I am told that it depends on the point of order being raised – a provision that has a point of order under section 313(b)(1)(f) raised against it that is sustained, meaning there are not 60-votes to waive it, would drop that provision out of a reconciliation bill. But, a provision that has a point of order under section 310(g) of the Congressional Budget Act raised against it that is sustained would bring down the whole bill.

Senator Thune: The whole bill? So what my colleague is saying is that if a bill were to be considered by the Senate that contained a provision that was in violation of section 310(g) of the Congressional Budget Act, and if there were not 60-votes in the Senate to waive that section of the Budget Act, the whole bill would have to be withdrawn.

Senator Cornyn: That is correct.

Senator Thune: That is quite a remedy. I am curious – are either of my colleagues aware if there is precedent in this area, for this Social Security point of order being raised against reconciliation bills in the past?

Senator Gregg: It is my understanding that no Senator has ever attempted to raise this point of order, so we do not know how this might be ruled upon. But we do know that Section 201 of the Social Security Act specifically references the Social Security Trust fund, so any legislation that affects Social Security payroll taxes seems likely to trip the Byrd rule in this area. If I may read the Byrd rule provision in question to my friends again, it creates a point of order against any legislation that “contains recommendations with respect to the old-age, survivors, and disability insurance programs established under title II of the Social Security Act.”

Senator Cornyn: If I may interrupt, are my colleagues aware of any recommendations regarding the Social Security program in any potential reconciliation bill that the Senate might consider?

Senator Gregg: I am in fact. Are my colleagues familiar with the tax on “high-cost” health care plans that was included in the Senate-passed health care legislation?

Senator Thune: My colleague is of course referring to the provision known as the high premium excise tax – or so-called Cadillac plan tax. Under the Senate-passed bill beginning in 2013, health insurance plans that exceed \$8,500 for individuals and \$23,000 for families would be subject to a 40% excise tax payable by insurance companies or administrators of a self-insured arrangement. The 17 highest cost States would receive a higher threshold for three years. The dollar thresholds for retirees and workers in certain “high risk professions” and workers who repair or install electrical or telephone lines would also be higher. I had heard that the reconciliation bill in the House would consider changing this provision – in fact, I have something here in front of me from the website of the White House, something that outlines the President’s proposals for changes to the Senate-passed bill. Here it says that the President proposes delaying this tax until 2018. My understanding is that this is a major priority of the House in implementing their changes to the bill. Would my colleague mind explaining how this tax could be construed as providing a recommendation regarding Social Security?

Senator Cornyn: I would be happy to. The Joint Committee on Taxation, the Congressional Budget Office, top economists working for the Administration – like Jonathan Gruber from MIT – and even members on the other side of the aisle have said that the high premium excise tax will increase wages for workers. This is because either insurance companies will begin to offer plans that fall below the thresholds for the tax, or workers and employers will simply demand lower-cost plans. This shift in behavior will result in compensation shifting from being tax-exempt, to being taxable for both (1) income and (2) payroll taxes purposes. Based on the experts – and even admitted to by our Democratic colleagues – the high premium excise tax would affect payroll taxes. And correspondingly, the tax would – in the end – affect Social Security benefits. As a result, this tax would have an impact on the Social Security Trust Fund.

Now in the interest of time, I cannot read you all of the quotes from JCT, CBO, Professor Gruber, and my Democratic colleagues that is the authority on which my statements are based, but I would like to highlight a few:

According to an October 13, 2009 letter from the Joint Committee on Taxation, JCT says “when employers offer employees less costly plans, the employees will have less compensation in the form of non-taxable health care benefits and MORE in the form of taxable compensation.” JCT further explains that “because health insurance premiums are a component of compensation, which is not likely to fluctuate due to the tax, as consumers spend less on tax-excluded health benefits, their cash wages will increase.” CBO has said the same thing.

Professor Gruber – who, again, has contracted with the Administration to provide technical advice on the Democrats’ health care reform proposals – in an OP-ED dated December 28, 2009 said the following: “by my calculations, high premium excise tax [included in the Senate bill passed on Christmas Eve] would raise U.S. worker wages by a total of \$223 billion over 10 years.”

My good friend from Montana – Senator Baucus – has even said: “CBO says premiums will decrease and wages will increase. In fact, the bulk of the revenue raised by this provision – more than 83 percent comes not from the tax itself, but from increased wages. MIT economist Jonathan Gruber estimates this provision will cause workers’ wages to rise.”

Senator Gregg: So my colleague is saying that JCT, CBO, outside experts, and even our friends on the other side of the aisle are all telling us that the high-cost plans tax would result in a change both to Social Security revenues and to benefits?

Senator Cornyn: That is correct. Wages will go up as a result of the high premium excise tax, which means payroll tax revenue will go up and Social Security benefits for these workers will increase. In its March 11, 2010 update on the score of the Senate-passed bill, it appears JCT indicates that the Cadillac plan tax will raise over \$31 billion in payroll taxes. CBO’s updated estimate of the Senate-passed bill also says the bill generates \$53 billion in “off-budget” revenue. CBO explains in a footnote that these “Off-budget effects include changes in Social Security spending and revenues.”

Senator Gregg: The good Senator stated earlier that the President and House of Representatives have proposed to delay the effective date of the high premium excise tax. I believe the Senator referred to the President’s February 22, 2010 Health Care Reform Proposal, and supporting information on a web site established by the White House. I ask the Senator, if the Senate-passed bill is signed into law by the President, and the effective date of the high premium excise tax – which under the new law would be January 1, 2013 – is subsequently delayed to say, 2018, wouldn’t that lower Social Security revenue? And if so, wouldn’t the modification fall into the category of a recommendation with respect to Social Security?

Senator Thune: I believe that delaying the effective to 2018 WOULD lower Social Security revenue by eliminating the payroll tax revenue. After all, the Senate-passed bill would have been signed into law by the President. Which means, the budget baseline on which the Congressional Budget Office would work from, would assume the payroll tax revenues from a tax that is effective in 2013 – not 2018.

Senator Gregg: I thought that couldn't be done in a reconciliation bill, due to the Byrd rule we discussed earlier. It seems like a recommendation with respect to Social Security.

Senator Thune: Is my esteemed colleague aware of any guidance from the chair on this matter?

Senator Gregg: Well, there is no official ruling on such a provision in a reconciliation bill. We haven't received a ruling on the reconciliation bill in question, because we haven't seen the reconciliation bill in question – there is no legislative language available to the public and we do not know if the will have such a provision in it. However, I believe that the Finance Committee received informal guidance in August of 2005 that extending payroll taxes that fund Social Security coverage would violate both the Byrd rule prohibition on changes to Social Security and section 310(g) of the Budget Act.

Senator Thune: That guidance make sense, because section 201(a) of Title II of the Social Security Act states that the funding mechanism for - or as the statute specifically reads, amounts "appropriated to" - the Federal Old-Age and Survivors Insurance Trust Fund are "taxes imposed under the Internal Revenue Code." Thus, any changes to taxes imposed under the Internal Revenue Code - or better known as payroll taxes - specifically affects section 201(a) of the Title II of the Social Security Act and the amounts "appropriated to" the Social Security Trust Fund.

Senator Gregg: I agree. So it seems that any legislation affecting Social Security payroll taxes would trip the 310(g) point of order, which, to remind my colleagues, prevents legislation that "contains recommendations with respect to the old-age, survivors, and disability insurance programs established under title II of the Social Security Act." There certainly seems to be a strong argument that any changes to Social Security included in the reconciliation bill would cause a 310(g) point of order. If that point of order is sustained, the reconciliation bill will fall.

Senator Thune: Isn't it the case that a reconciliation bill cannot make such changes unless 60 Senators agree to waive the applicable provisions of the Budget Act?

Senator Cornyn: That is correct. And if I'm remembering correctly, just last week I signed a letter along with 40 other of my esteemed Republican colleagues saying that we would not agree to waive any applicable provisions of the Budget Act during any health care debate.

Senator Thune: I also remember signing this letter. Now, we will have to wait to see the bill and the cost estimate and then for the Chair to rule on this point of order in the Budget Act that no one has ever attempted to raise before, but it seems obvious to me that the only conclusion that can be drawn from this set of facts is that the House and Senate will be unable to change the tax on high-cost plans in a reconciliation bill.